PB Securities Sdn Bhd v Raja Abd Rahman bin Raja Mansor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1254 OF 2001
MAH WENG KWAI JC
28 JANUARY 2010

Contract — Contractual terms — Share trading losses — Indemnity — Responsibility to settle — Whether defendant bound by various indemnities given to plaintiff from time to time — Whether defendant had knowledge of status of client's account

The plaintiff, now known as Public Investment Bank Bhd, is a licensed share broking company and employed the defendant as a licensed dealer for the plaintiff, known as a dealing agent. As a senior dealer, the defendant was authorised to trade in shares in his own right and on behalf of the plaintiff's clients. On 15 November 1996, a margin facility agreement ('MFA') was entered into between the plaintiff and a client known as Ahmad Hisham ('AH') to facilitate the share trading by AH. As at 31 January 2001, AH failed to settle the sum of RM5,322,422.43 due and owing to the plaintiff pursuant to the MFA. Accordingly, the plaintiff claimed the above sum from the defendant which was based on various indemnities given from time to time by the defendant to the plaintiff. The plaintiff contended, inter alia, that the defendant was in breach of the various indemnities contained in the contract for service, service undertaking, margin facility application form and the two letters of indemnity by failing to indemnify the plaintiff for the losses incurred in AH's account. The defendant, in disputing the plaintiff's claim, contended, inter alia, that AH was the client of his superior officer, Nizam bin Tun Abdul Razak ('Nizam'), the CEO of the plaintiff at the material time, and not his. The defendant further contended that he did not introduce AH to the plaintiff and that he traded on AH's account on the instructions of Nizam, and had no knowledge of the share trading account of AH. The main issue to be determined by the court was whether the defendant was bound by the various indemnities given from time to time to the plaintiff.

Held, allowing the plaintiff's claim with costs:

(1) Having agreed that he had signed the service undertaking and the contract for service, the defendant cannot now be heard to say that he did not enter into the said agreements with the plaintiff and thus was not aware of the terms therein. There was no evidence whatsoever to show that the defendant had signed the two documents under duress or that the terms thereof had been misrepresented to him or that he was

induced into signing the documents through fraud. It was unacceptable that an educated person like the defendant, holding a senior position would have been made to enter into two agreements with the plaintiff without his knowledge or consent. The defendant was entering into contracts for his professional services with the plaintiff and was not signing them as a mere formality (see paras 22–23).

(2) The fact that AH traded in shares utilising the margin facility could not be denied by the defendant. The defendant when carrying on the share trading for AH must have known of the terms of the MFA. It was wholly unbelievable for the defendant to state in his evidence that he was not aware of the MFA (see para 29).

(3) It was inconceivable that the defendant would have signed the two letters of indemnity without knowing the name of the client for whom he was requesting for a margin facility from the plaintiff and without knowing the amount of the facilities. The two letters of indemnity are prima facie evidence that they contained the handwritten details at the time they were signed by the defendant (see paras 30–31).

(4) There was no evidence whatsoever to suggest that the indemnities were given by Nizam and not by the defendant or that the defendant gave the indemnities for and on behalf of Nizam. It was the defendant who gave the indemnities personally to the plaintiff and not as an agent for and on behalf of Nizam. There was no evidence adduced by the defendant to show that before the defendant could be held liable, the plaintiff must take action against the (main) dealer to recover the losses. Further, the fact that the defendant did not challenge the evidence of PW2 coupled with the fact that the defendant had earned large sums of incentive bonuses on account of AH's share trading clearly showed that the defendant had full knowledge of AH's account and had actively participated in the share trading by AH (see paras 39–40 & 44).

[Bahasa Malaysia summary

Plaintif, yang kini dikenali sebagai Public Investment Bank Bhd, adalah sebuah syarikat broker saham berlesen dan melantik defendan sebagai peniaga ('dealer') untuk plaintif, dikenali sebagai ejen peniaga. Sebagai peniaga kanan, defendan diberi kuasa untuk meniaga saham dalam haknya sendiri dan bagi pihak pelanggan plaintif. Pada 15 November 1996, satu perjanjian kemudahan margin ('PKM') dimeterai di antara plaintif dan seorang klien dikenali sebagai Ahmad Hisham ('AH') untuk memudahkan perniagaan saham oleh AH. Setakat 31 Januari 2001, AH gagal menyelesaikan jumlah sebanyak RM5,322,422.43 yang tertunggak dan terhutang kepada plaintif menurut PKM. Oleh demikian, plaintif memohon jumlah tersebut daripada defendan yang berdasarkan kepada beberapa jaminan yang diberi dari masa ke semasa oleh defendan kepada plaintif.

Plaintif menghujah, antara lain, bahawa defendan telah melanggar beberapa jaminan yang terkandung di dalam kontrak perkhidmatan, akujanji perkhidmatan, borang permohonan kemudahan margin dan dua surat jaminan dengan kegagalan untuk membayar ganti rugi plaintif bagi kerugian yang dialami oleh akaun AH. Defendan dalam mempertikaikan tuntutan plaintif, menghujah, antara lain, bahawa AH adalah pelanggan pegawai atasannya, Nizam bin Tun Abdul Razak ('Nizam'), CEO plaintif pada masa material, dan bukan pelanggannya. Defendan selanjutnya menghujah bahawa dia tidak memperkenalkan AH kepada plaintif dan bahawa dia berniaga atas akaun AH atas arahan Nizam, dan tidak mempunyai pengetahuan mengenai akaun perniagaan saham AH. Isu utama untuk diputuskan oleh mahkamah adalah sama ada defendan terikat oleh beberapa indemniti yang diberikan dari masa ke semasa kepada plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Setelah bersetuju bahawa dia telah menandatangani akujanji perkhidmatan dan kontrak untuk perkhidmatan, defendan kini tidak boleh menyatakan bahawa dia tidak memasuki perjanjian tersebut dengan plaintif dan oleh itu tidak mengetahui terma-terma di dalamnya. Tidak ada keterangan untuk menunjukkan bahawa defendan telah menandatangani dua dokumen dalam keadaan dures atau bahawa terma-terma di dalamnya telah disalah nyata kepadanya atau dia dipujuk untuk menandatangani dokumen melalui fraud. Ia tidak boleh diterima bahawa seorang yang berpelajaran seperti defendan, yang memegang jawatan kanan boleh dipaksa memasuki dua perjanjian dengan plaintif tanpa pengetahuan atau persetujuannya. Defendan memasuki kontrak-kontrak untuk perkhidmatan profesionalnya dengan plaintif dan tidak menandatanganinya sebagai formaliti semata-mata (lihat perenggan 22–23).

(2) Fakta bahawa AH meniaga saham-saham menggunakan kemudahan margin tidak boleh dinafikan oleh defendan. Defendan apabila menjalankan perniagaan saham untuk AH sepatutnya mengetahui terma-terma PKM. Ia tidak boleh dipercayai sepenuhnya untuk defendan menyatakan di dalam keterangannya bahawa dia tidak tahu mengenai PKM (lihat perenggan 29).

(3) Adalah tidak boleh dipercayai bahawa defendan telah menandatangani dua surat indemniti tanpa mengetahui nama pelanggan untuk siapa dia memohon kemudahan margin daripada plaintif dan tanpa mengetahui jumlah kemudahan tersebut. Kedua-dua surat indemniti adalah keterangan prima facie bahawa ia mengandungi butiran dalam tulisan tangan pada masa ia ditandatangani oleh defendan (lihat perenggan 30–31).

A (4) Tidak ada keterangan untuk menyarankan bahawa indemniti yang diberikan oleh Nizam dan bukan oleh defendan atau bahawa defendan memberikan indemniti untuk dan bagi pihak Nizam. Ia adalah defendan yang memberikan indemniti-indemniti tersebut secara peribadi kepada plaintif dan bukan sebagai ejen untuk dan bagi pihak
B Nizam. Tidak ada keterangan yang dikemukakan oleh defendan untuk menunjukkan bahawa sebelum defendan boleh diputuskan bertanggungan, plaintif mesti mengambil tindakan terhadap peniaga (utama) untuk mendapatkan semula kerugian yang dialaminya. Selanjutnya, fakta bahawa defendan tidak mencabar keterangan PW2
C bersama dengan fakta bahawa defendan telah memperoleh jumlah besar bonus sebagai insentif atas akaun perniagaan saham AH jelas menunjukkan bahawa defendan mempunyai pengetahuan penuh mengenai akaun AH dan telah secara mengambil bahagian secara aktif dalam perniagaan saham oleh AH (lihat perenggan 39–40 & 44).]

D

Notes

For cases on share trading losses, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3311–3341.

E **Cases referred to**

Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631, CA (refd)

Malayan Banking Bhd v Senorita Holdings Sdn Bhd & Ors [764] MD 3; [1991] 3 CLJ 2888, HC (refd)

F *Maybank Securities Sdn Bhd v Kassim Mahat* [2008] 8 CLJ 715, HC (folld)

Ming Lian Corporation Sdn Bhd v Haji Noordin [1974] 1 MLJ 52, HC (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, SC (folld)

Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113, HC (refd)

G *Sime Securities Sdn Bhd (formerly known as UMBC Securities Sdn Bhd) v Wong Kok Wah* [2005] 4 MLJ 621, HC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

H *Shanti Mogan (Shearn Delamore & Co) for the plaintiff.*
Ahmad Zaharil (M Azam bin M Tarudin with him) (AM Zaharil & Co) for the defendant.

Mah Weng Kwai JC:

I

[1] The plaintiff, now known as Public Investment Bank Bhd, claims for the sum of RM5,322,422.43 as at 31 January 2001 with interest thereon at the rate of 11%pa from 1 February 2001 till date of full payment and costs

from the defendant. The plaintiff's claim is based on various indemnities given from time to time by the defendant to the plaintiff.

[2] The plaintiff is a licensed share broking company and employed the defendant on 2 April 1992 as a licensed dealer for the plaintiff, known as a dealing agent. As a senior dealer, the defendant was authorised to trade in shares in his own right and on behalf of the plaintiff's clients. The documents in respect of the defendant's employment are:

(a) letter of appointment dated 2 April 1992 at bundle F1 p 1;

(b) service undertaking dated 17 June 1992 at bundle F1 pp 5–10;

(c) contract for service dated 28 July 1992 at bundle F1 pp 2–4; and

(d) letter of re-designation dated 1 October 1992 at bundle F1 p 11.

[3] On 15 November 1996 a margin facility agreement ('MFA') (bundle F1 pp 12–27) was entered into between the plaintiff and a client known as Ahmad Hisham ('AH') to facilitate the share trading by AH. As at 31 January 2001, AH failed to settle the sum of RM5,322,422.43 due and owing to the plaintiff pursuant to the MFA.

THE PLAINTIFF'S CASE

[4] The defendant as a share dealing agent was responsible for handling the share trading accounts of various clients of the plaintiff.

[5] The defendant pursuant to his contract for service, the service undertaking and two letters of indemnity undertook to indemnify the plaintiff for all losses incurred in the trading accounts of the plaintiff's clients handled by the defendant.

[6] One such account holder was AH.

[7] The defendant had introduced and recommended AH to be a client of the plaintiff. AH applied to open a margin trading account with the plaintiff by signing a margin facility application form (bundle F1 pp 30–31).

[8] The defendant by signing at the bottom of the page at bundle F1 p 31 undertook to indemnify the plaintiff against any losses incurred by AH.

[9] The defendant signed a letter of indemnity dated 5 November 2006 (bundle F1 p 28) when he requested the plaintiff to grant a margin facility

of RM750,000 to AH. In consideration the defendant undertook to indemnify the plaintiff against any losses incurred by AH.

[10] On 15 November 1996, the margin facility agreement was entered into between the plaintiff and AH.

[11] On 26 November 1996 the defendant signed another letter of indemnity (bundle F1 p 29) when he requested the plaintiff to increase the margin facility to RM5,000,000 for AH. In consideration thereof, the defendant undertook to indemnify the plaintiff against all losses incurred in AH's account.

[12] The defendant is in breach of the various indemnities contained in the contract for service, service undertaking, margin facility application form and the two letters of indemnity by failing to indemnify the plaintiff for the losses incurred in AH's account.

[13] Pursuant to cl 6 and item 4 of the second schedule to the MFA (bundle F1 pp 15–27) the plaintiff is entitled to claim for interest at the rate of 11%pa from 1 December 1999 on the outstanding sum due and payable to the plaintiff.

[14] There is no dispute between the plaintiff and defendant on the quantum owing and the interest rate applicable.

THE DEFENDANT'S CASE

[15] The defendant in disputing the plaintiff's claim raised the following issues:

(a) that AH was the client of his superior officer Nizam bin Tun Abdul Razak (Nizam) the CEO of the plaintiff at the material time, and not his;

(b) that he did not introduce AH to the plaintiff;

(c) that he traded on AH's account on the instructions of Nizam, and had no knowledge of the share trading account of AH;

(d) that he was not aware of the terms and conditions of his contract of service and service of undertaking;

(e) that when he signed the two letters of indemnity they were 'blank' in that there was no handwritten details on them.

(f) that the plaintiff ought to have called Nizam as he had signed the letter of appointment dated 2 April 1992 and contract for service dated 28

July 1992; the person who witnessed the defendant's signature on the two letters of indemnity to prove that the handwritten details were already on the said letters of indemnity when they were signed by the defendant and Noraini Ashaari, the manager who signed the letter dated 26 November 1996 increasing the margin facility to RM5,000,000 for AH (bundle F1 pp 33–34). Defence counsel urged the court to invoke the presumption under s 114(g) of the Evidence Act 1950 against the plaintiff for failing to call the said witnesses;

(g) that the code 'DRA' in respect of AH's account was not his code; and

(h) that the plaintiff failed to mitigate the losses occasioned by AH's share trading and to take action against AH to recover the outstanding sum.

[16] The main issue to be determined by the court is whether the defendant is bound by the various indemnities given from time to time to the plaintiff. To prove its case the plaintiff called three witnesses. The defendant was the only witness for his case.

[17] In my judgment I have considered, inter alia, the following issues:

Whether the defendant had knowledge of the terms in the service undertaking (bundle F1 pp 5–10) and the contract for service (bundle F1 pp 2–4)

[18] Although the defendant did plead in para 4 of his defence that he did not enter into the service undertaking nor the contract for service with the plaintiff, importantly the defendant did not adduce evidence in support of this contention either in his written statement (DWIS) or during his oral evidence.

[19] On the contrary, it is an agreed fact (statement of agreed facts para 4) (encl B) that the defendant did sign the service undertaking on 17 June 1992 and the contract for service on 28 July 1992 respectively.

[20] Pursuant to the service undertaking the defendant undertook that:

> On demand pay and make good to my Employers the amount of all loss, damage and expense which may be sustained or incurred by my Employers by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted or suffered by me at any time while I am in the service of my Employers.

and

[21] Pursuant to the contract for service the defendant undertook that:

Monies due

You shall be responsible and liable for discharging all obligations and payments to us and/or for all monies due and payable to us and/or in respect of all whatsoever transactions or dealings carried out or entered into by you, your servant or others assisting you.

Indemnity

In consideration of all the aforesaid:

...

(2) You shall indemnify us and keep us/the Dealer indemnified against all claims, losses and liabilities whatsoever caused by the non payment and/or observance on your part, *and or clients handled bv vou or any contract entered into between vou with vour clients on behalf of the Dealer or Company* including the cost of any litigation.

(3) You shall be responsible for bad debts, tosses and any amount due from your clients or Dealing Assistants *and shall indemnify* us and/or the Dealer for such amount

Binding

Should you accept the above terms and conditions, kindly sign on the duplicate copy of this letter and return the same to the undersigned.

[22] Having agreed that he had signed the service undertaking and the contract for service, the defendant cannot now be heard to say that he did not enter into the said agreements with the plaintiff and thus was not aware of the terms therein. The defendant was employed by the plaintiff on 2 April 1992 as a senior dealer. There is no evidence whatsoever to show that the defendant had signed the two documents under duress or that the terms thereof had been misrepresented to him or that he was induced into signing the documents through fraud. It is unacceptable that an educated person like the defendant, holding a senior position would have been made to enter into two agreements with the plaintiff without his knowledge or consent.

[23] The defendant was entering into contracts for his professional services with the plaintiff and was not signing them as a mere formality.

[24] In the case cited by plaintiff's counsel of *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 Chua J adopted the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 that a 'signature is irrefragable evidence of (a person's) assent to the whole contract'. At p 114 Chua J held:

I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the reiations between them, then, to use the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co Ltd* 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'.

Chua J went on to quote Scrutton LJ in the case of *L'Estrange v Graucob Ltd* [1934] 2 KB 394, who said:

When a document containing contractual terms is signed, then, in the absence of fraud; or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[25] I find without hesitation that the defendant did enter into the two agreements with the plaintiff. There is no suggestion whatsoever that the defendant's signature is a forgery. As such the defendant is bound by the terms contained therein.

Whether the two letters of indemnity were signed 'blank'

[26] The defendant in para 6 of his defence pleaded that he was forced by the plaintiff and Nizam to sign the two letters of indemnity and that he had no knowledge of the indemnities.

[27] The defendant further pleaded in para 7 of the defence that when he signed the two letters of indemnity, apart from the printed words, there were no handwritten details on them and as such he is not bound by the terms of the two letters of indemnity.

[28] In answer to a question by the court (notes of proceedings at p 36) the defendant admitted that *before* the MFA could be entered into between the plaintiff and AH, he had to give a letter of indemnity to the plaintiff. In the present case the first letter of indemnity was given on 5 November 1996 while the MFA was entered into on 15 November 1996. The defendant's second letter of indemnity was signed on 26 November 1996. It is inconceivable that the defendant had been forced by the plaintiff and Nizam to sign the indemnities or that the plaintiff would have entered into the MFA with AH when the first letter of indemnity which was a prerequisite or precondition for the MFA was incomplete without the details of AH being inserted.

[29] The fact that AH traded in shares utilising the margin facility cannot be denied by the defendant. As can be seen in bundle F1 p 30, the volume of trading on 6 November 1996 was more than the net annual income of AH of between RM51,000–RM100,000. The defendant when carrying on the share trading for AH must have known of the terms of the MFA. It is wholly

unbelievable for the defendant to state in his evidence that he was not aware of the MFA as he had not seen it 'in the whole of my 12 years in PB Securities'.

[30] It is the plaintiff's case that the two letters of indemnity had been filled in with the details in handwriting when the defendant signed them. Again it is inconceivable that the defendant would have signed the two letters of indemnity without knowing the name of the client for whom he was requesting for a margin facility from the plaintiff and without knowing that the facility was for RM750,000 in the first letter of indemnity and for RM5,000,000 in the second letter of indemnity.

[31] The two letters of indemnity appearing in bundle F1 pp 28–29, are prima facie evidence that they contained the handwritten details at the time they were signed by the defendant. Contrary to the contention by defence counsel that the plaintiff ought to have called the person who witnessed the defendant's signature as a witness for the plaintiff and to invoke the presumption under s 114(g) of the Evidence Act when the plaintiff failed to do so, is to my mind, without merit. As it is the defendant who claims to have signed the two letters of indemnity in 'blank' it will then be incumbent upon him to call the witness to prove this. The burden of proof shifts to the defendant and it will not be proper to invoke the presumption against the plaintiff in the circumstances.

[32] In any event an adverse inference under s 114(g) of the Evidence Act can only be drawn if there is a withholding or suppression of evidence. In the present case I do not think that the plaintiff has withheld or suppressed any evidence. It is open to the defendant to call the witness to his signature, by subpoena if necessary, to prove that the two letters of indemnity were indeed signed 'blank'.

[33] In the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ (Rep) 221 Mohamed Azmi SJC at p 223 held:

> It is essential to appreciate the scope of s 114(g) of the Evidence Act lest it be carried too far outside its limit adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non production of not just any witness but an important and material witness to the case.

[34] Further, taking for a moment that the defendant did sign the two letters of indemnity without the handwritten details inserted, the fact remains

that the defendant knew he was signing letters of indemnity as the caption of the letters clearly states 'letter of indemnity' and the contents of the letters of indemnity referred to the grant of margin facility by the plaintiff to a client.

[35] It is trite law that in the absence of fraud or misrepresentation, the mere allegation that some particulars had not been filled in at the time, as alleged by the defendant in this case, when the document was signed would not absolve the person from liability and he would be bound by the terms of the document.

[36] I need only to refer to the cases of *Malayan Banking Bhd v Senorita Holdings Sdn Bhd & Ors* [764] MD 3; [1991] 3 CLJ 2888 where Zakaria M Yatim J held at pp 2890–2891:

> I have examined the letter of guarantee. Except for the preamble, para 4 and the space for the date and signatures and the particulars of the persons who signed the letter of guarantee, on the third page of the letter of guarantee, all the terms of the guarantee are already printed on the document. *Any person who signs the document before the particulars are filled in should know that he is stoning a letter of guarantee and no other document*. The printed words 'We ... the undersigned hereby jointly and severally agree with and guarantee you ...' are explicit enough. Furthermore the second defendant knew all the time that the first defendant was applying for a loan from the plaintiff. He wrote the application letter to the plaintiff and he signed the circular resolution of the first defendant He even signed at the bottom of the letter of offer accepting the terms and conditions of the loan facility. If he read the letter of offer at page one under 'security' he would see his name and the name of the third defendant as directors of the first defendant who were required to sign the letter of guarantee. The second defendant has not made any allegation of fraud or misrepresentation in his defence. *In the absence of any allegation of fraud or misrepresentation, the letter of guarantee is valid and he is bound by the terms of the guarantee even if the particulars had not been filled in at the time it was signed by the second defendant.*

and of *Ming Lian Corporation Sdn Bhd v Haji Noordin* [1974] 1 MLJ 52 where Pawan Ahmad J held at p 54.

> Counsel for the plaintiffs referred to the case of *Gailie v Lee & Anor* [1969] 1 All ER 1062 where it is laid down that 'unless fraud or misrepresentation is pleaded and proved by the defendant, the defendant cannot come to court and say it was not an offer'. In the present case neither fraud nor misrepresentation was pleaded or proved by the defendant and as such I agree with the submission of counsel for the plaintiffs, *I also agree with the submission of counsel for the plaintiffs that the defendant who is an educated person and a retired government official of many years' standing, conversant with court procedure, knew what he was signing for and that he was fully aware of the particulars which should have been inserted in the spaces left blank at the time of signing. I cannot imagine that a person of the class of the defendant would have been irresponsible to the extent of signing a blank form without having known the terms and conditions of the agreement*. He took away the car immediately

after signing the blank form. *There thus was offer and acceptance and it can be implied from this that he knew very well that what he was signing was a binding contract between him and the plaintiffs*. I agree with the contention of counsel for the plaintiffs that there was very little difference between a bond and a contract, and that if a bond can be filled up after execution, so can a contract.

THE TWO LETTERS OF INDEMNITY

[37] The first letter of indemnity dated 5 November 1996 at para 4 provides:

> In consideration of you agreeing to grant and/or continuing to grant the margin facility of Ringgit Seven Hundred And Fifty Thousand (RM750,000.00) to the Client at my request, I hereby undertook and covenant to indemnify and to keep you and your successors-in-title and assigns at all times fully indemnified against all losses, damages, costs and expenses which may be sustained or incurred by you and your successors-in-title and assigns at any time and from time to tome arising from or by reason of the margin facility made available by you to the Client at my request herein.

and the second letter of indemnity dated 26 November 1996 at para 3 provides:

> In consideration of you agreeing to grant and/or continuing to grant the margin facility of Ringgit FIVE MILLION (RM5,000,000.00) to the Client at my request, I hereby undertake and covenant to indemnify and to keep you and your successors-in-tile and assigns at all times fully indemnified against all losers, damages, costs and expenses which may be sustained or incurred by you and your successors-in-tile and assigns at any time and from time to time arising from or by reason of the margin facility made available by you to the Client at my request therein.

[38] To my mind it is clear that the defendant knew what he was doing when he signed the two letters of indemnity. The following circumstances show that the defendant had benefitted from the trading on AH's account utilising the margin facility, bearing in mind always that the MFA would not have been entered into without the first letter of indemnity being given by the defendant.

(a) The defendant was authorised to trade for AH in return for incentive bonuses;

(b) The incentive bonuses earned by the defendant from 1993–1997 totalled RM1,994,311.12;

(c) The two letters of indemnity were stamped after stamp duty had been paid. It is highly improbable that the stamp duty office would have stamped the two letters of indemnity without the value or amount of the margin facility being inserted;

(d) AH when applying for the margin facility filled in the margin facility application form for a facility of RM1,500,000. The defendant also signed at the bottom of p 2 of the application form (bundle F1 p 31) after acknowledging that he would be responsible for making good any debts incurred by the applicant and shall indemnify the plaintiff for all claims and losses.

Whether the defendant merely followed the instructions of Nizam and whether action should have been taken against Nizam

[39] The defendant contended that he was merely trading on the account of AH on the instructions of his senior officer, Nizam. It appears to me that nothing could be further from the truth as all that Nizam did was to introduce AH to the defendant. Thereafter it was the defendant who introduced and recommended AH to the plaintiff to be a client. It was the defendant who handled the day to day trading on AH's account and of other clients, not Nizam. There is no evidence whatsoever to suggest that the indemnities were given by Nizam and not by the defendant or that the defendant gave the indemnities for and on behalf of Nizam. Defence counsel in his written submission urged the court to invoke the presumption of adverse inference under s 114(g) of the Evidence Act when the plaintiff did not call Nizam as a witness. Based on what has been said in *Munusamy v Public Prosecutor* I do not think an adverse inference ought to be invoked in this instance as well.

[40] Defence counsel also contended that Nizam being the (main) dealer ought to be held responsible by the plaintiff, and not the defendant as he was merely the dealing agent assisting Nizam. I find no merit in this contention as it was the defendant who gave the indemnities personally to the plaintiff and not as an agent for and on behalf of Nizam. The defendant may well have been an assistant to Nizam but there is no evidence adduced by the defendant to show that before the defendant can be held liable, the plaintiff must take action against the (main) dealer to recover the losses.

Whether 'DRA' was the defendant's code and whether the defendant had knowledge of trading on AH's account

[41] At the outset, the defendant denied that 'DRA' was his trading code. The defendant contended that he had no knowledge of the trading on AH's account.

A **[42]** However in cross-examination the defendant admitted that 'DRA' was his code and that he had carried out transactions on behalf of AH. At p 27 of the notes of proceedings the defendant in answer to a question by plaintiff counsel on whether his dealer code was 'DRA', replied 'Yes, but I do not recall'.

B

[43] Further the contract notes (bundle F1 pp 91–911) and AH's statements of accounts (bundle F1 p 92 to bundle F3 p 1070) all clearly bear the code 'DRA'.

C **[44]** As the defendant was in charge of AH's account, he was given daily business done reports and share margin available limit reports on a daily basis by PW2, Gunalan s/o Chinniah, the senior executive of share margin section of the plaintiff company. The defendant did not challenge the evidence of PW2. This, coupled with the fact that the defendant had earned large sums
D of incentive bonuses on account of AH's share trading clearly show that the defendant had full knowledge of AH's account and had actively participated in the share trading by AH. Please see p 33 of the notes of proceedings.

Whether the plaintiff took action against AH

E

[45] The defendant had alleged that the plaintiff had failed to take any action against AH to recover the outstanding debts. However in his cross-examination at p 31 of the notes of proceedings, the defendant agreed
F that AH had in fact been sued and judgment obtained against him.

Whether the plaintiff took steps to mitigate the losses

[46] Although defence counsel in his written submission submitted that
G the plaintiff ought to have taken steps to mitigate the losses incurred on account of the share trading by AH, the court notes that this issue was not pleaded in the defence. In any event the defence has failed to show any contractual requirement, indeed obligation, on the part of the plaintiff to restrict the volume of AH's share trading with a view of 'cutting losses' during
H the tenure of the MFA.

[47] On the totality of the evidence adduced and having considered the oral and documentary evidence I find that the defendant did in fact give indemnities to the plaintiff from time to time. Indeed at pp 23–24 of the
I notes of proceedings the defendant had admitted that he did provide the indemnities to the plaintiff.

[48] In law a dealer representative, such as the defendant will be liable to indemnify the stock broking firm for losses incurred by the clients handled by

him and I refer to the cited cases of *Maybank Securities Sdn Bhd v Kassim Mahat* [2008] 8 CLJ 715 and *Sime Securities Sdn Bhd (formerly known as UMBC Securities Sdn Bhd) v Wong Kok Wah* [2005] 4 MLJ 621 in support.

[49] It is the finding of the court on a balance of probabilities, that the defendant is bound by contract to indemnify the plaintiff for all the losses incurred on account of the share trading of AH.

[50] I find that the plaintiff has succeeded in proving its case against the defendant and accordingly the plaintiff's claim is hereby allowed with costs.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed